**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan. | )  )  )  )  )  )  ) | Case No. 14-1297-EL-SSO |

**JOINT MEMORANDUM CONTRA FIRSTENERGY’S MOTION TO STRIKE**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

**AND**

**NORTHWEST OHIO AGGREGATION COALITION**

The Office of the Ohio Consumers’ Counsel (“OCC”)[[1]](#footnote-1) and the Northwest Ohio Aggregation Coalition (“NOAC”) file this memorandum contra the motion of FirstEnergy[[2]](#footnote-2) to strike portions of their Joint Reply Brief. FirstEnergy’s claims and allegations in its motion are without merit. Accordingly, the Attorney Examiner’s should deny FirstEnergy’s motion to strike.

# INTRODUCTION

On February 16, 2016, OCC/NOAC filed its Initial Brief in this proceeding opposing FirstEnergy’s Electric Security Plan, as modified by numerous stipulations. On February 26, 2016, OCC/NOAC filed its Joint Reply Brief. On March 4, 2016, FirstEnergy filed a motion to strike portions of the OCC/NOAC Reply Brief.

FirstEnergy mistakenly believes that certain portions of the OCC/NOAC Reply Brief should be stricken because it includes testimony that the Attorney Examiner excluded from the record and amounts to hearsay that is not in the record.[[3]](#footnote-3) FirstEnergy is wrong.

OCC/NOAC’s Reply Brief does not contain improper information or evidence and FirstEnergy has failed to prove otherwise. The information that FirstEnergy seeks to strike from the OCC/NOAC Initial Brief was properly included as either record evidence or as a challenge to an attorney examiner ruling under O.A.C. 4901-1-15(F). For the reasons explained more fully below, the Public Utilities Commission of Ohio (“PUCO”) should deny FirstEnergy’s motion to strike.

# RECOMMENDATIONS

## Excluded testimony or evidence not in the record may be relied upon in a post-hearing brief in order to challenge an attorney examiner’s ruling under O.A.C. 4901-1-15(F).

FirstEnergy claims that OCC/NOAC improperly reference excluded or non-record evidence in their Reply Brief. Specifically, FirstEnergy claims that references to PUCO Staff witness Dr. Choueiki’s testimony from a previous proceeding was improper. FirstEnergy also moves to strike OCC/NOAC references to Ohio Manufacturers' Association Energy Group (“OMAEG”) witness Edward Hill’s testimony on the Consumer Protection Association. FirstEnergy believes the references were improper because the Attorney Examiner excluded this evidence from the record.[[4]](#footnote-4) FirstEnergy is incorrect.

Under O.A.C. 4901-1-15(F) a party may raise the propriety of an attorney examiner’s written or oral ruling as an issue for the PUCO to consider by discussing the matter in the party’s initial brief.[[5]](#footnote-5) Indeed, the PUCO has denied a motion to strike proffered evidence contained in a post-hearing brief when the evidence was offered to challenge an attorney examiner’s ruling.[[6]](#footnote-6)

First, OCC/NOAC’s reference to the previous testimony of Dr. Choueiki in its Reply Brief was not improper. FirstEnergy specifically seeks to strike the following portion of the OCC/NOAC Reply Brief:

“Indeed Dr. Choueiki testified that granting a PPA rider is a move in the opposite direction.”[[7]](#footnote-7)

As FirstEnergy notes, this testimony originates from Dr. Choueiki’s testimony from a previous proceeding.[[8]](#footnote-8) It concerns Dr. Choueiki’s opinion on how the Retail Rate Stability

Rider in this proceeding squares with Ohio's competitive generation market.[[9]](#footnote-9) The Attorney Examiner denied OCC’s requests to introduce (as exhibits) Dr. Choueiki’s testimony from two prior proceedings.[[10]](#footnote-10) The OCC then requested that the evidence be proffered.[[11]](#footnote-11) That proffer was accepted.

Instead of filing an interlocutory appeal the OCC/NOAC, in accordance with O.A.C. 4901-1-15(F) and PUCO precedent, explicitly requested in their Initial Brief that the PUCO reverse the Attorney Examiner’s decision.[[12]](#footnote-12) The portions of the OCC/NOAC Reply Brief that FirstEnergy moves to strike all stem from and lend support to OCC/NOAC’s challenge to the attorney examiner ruling. The passage from OCC/NOAC’s brief should be considered as part of the proffer, as it specifically shows how OCC/NOAC intended to use the stricken evidence. FirstEnergy neglects to discuss or rebut this fact.. Therefore, this portion of the OCC/NOAC Reply Brief is not improper.

But there are more reasons to deny FirstEnergy's motion. As the Retail Energy Supply Association (“RESA”) noted,[[13]](#footnote-13) the evidentiary record in this proceeding includes testimony from Dr. Choueiki on this very point.[[14]](#footnote-14) Indeed, the record contains the following question and answer between counsel for OCC and PUCO Staff witness Dr. Choueiki:

Q. I'm not sure, Dr. Choueiki, you answered my question. My question simply was would you believe that if the PUCO were to allow the rider RRS under the staff's alternative recommendation, that that would represent in your mind a move away from fully -- a fully competitive generation market?

A. Yes, if we are having a theoretical discussion, I would agree with that statement.[[15]](#footnote-15)

Therefore, the evidence that FirstEnergy is seeking to strike from the OCC/NOAC Initial Brief is already properly before the PUCO. FirstEnergy’s motion to strike should be denied.

Second, FirstEnergy moves to strike OCC/NOAC’s reference in its Initial Brief to the testimony of OMAEG witness Mr. Hill concerning the Consumer Protection Association.[[16]](#footnote-16) FirstEnergy’s motion is, again, without merit.

As FirstEnergy notes, the Attorney Examiner struck Mr. Hill’s testimony on this subject from the record because it was deemed beyond the scope of cross examination.[[17]](#footnote-17) Instead of filing an interlocutory appeal, the OCC/NOAC, in accordance with O.A.C. 4901-1-15(F) and PUCO precedent, explicitly requested that the PUCO reverse the Attorney Examiner’s decision.[[18]](#footnote-18) The OCC/NOAC made a similar request in their Reply Brief.[[19]](#footnote-19) But the portions of the OCC/NOAC Reply Brief that FirstEnergy moves to strike all stem from and lend support to OCC/NOAC’s challenge to the Attorney Examiner ruling. FirstEnergy neglects to discuss or rebut this fact in its motion to strike.

OCC/NOAC’s reference to Dr. Choueiki’s and Mr. Hill’s testimony is not improper. FirstEnergy’s Motion to Strike these portions from f OCC/NOAC’s Reply Brief should be denied.

# CONCLUSION

Through its Motion to Strike, FirstEnergy would have the PUCO deny OCC the right to challenge an Attorney Examiner’s ruling. Additionally, FirstEnergy would have the Commission take away OCC's right to cite to record evidence. This is neither reasonable, lawful, or supported by Commission practice or policy. FirstEnergy’s OCC Motion to Strike should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing Joint Memorandum Contra FirstEnergy’s Motion to Strike was served upon the persons listed below via electronic transmission this 21st day of March, 2016.

*/s/ Larry S. Sauer*

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Deputy Consumers’ Counsel

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1. OCC represents the 1.4 million residential customers of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company. [↑](#footnote-ref-1)
2. FirstEnergy consists of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company. [↑](#footnote-ref-2)
3. FirstEnergy Motion to Strike Portions of OCC/NOAC Reply Brief at 1 (March 4, 2016). [↑](#footnote-ref-3)
4. See FirstEnergy Motion to Strike Portions of OCC/NOAC Reply Brief at 1, 3-5. [↑](#footnote-ref-4)
5. See O.A.C. 4901-1-15(F). [↑](#footnote-ref-5)
6. See *In the Matter of the Fuel Adjustment Clause of Columbus Southern Power Company and Ohio Power Company and Related Matters for 2010; In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case No. 10-268-EL-FAC, et al., Opinion and Order at 7-8 (May 14, 2014) (PUCO denying a motion to strike evidence from an initial brief that was excluded from the record but proffered by the party and then included in the initial brief in order to challenge the attorney examiner’s ruling). [↑](#footnote-ref-6)
7. See FirstEnergy Motion to Strike OCC/NOAC Reply Brief at 1 (FirstEnergy also moves to strike the accompanying footnote). See also OCC/NOAC Reply Brief at 1. [↑](#footnote-ref-7)
8. See FirstEnergy Motion to Strike OCC/NOAC Reply Brief at 3-4. See also Proffer Tr. XXX at 6218-6222; Proffered OCC Ex. 31 (*In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 13-2385, Choueiki Direct Testimony (May 20, 2014)); Proffered OCC Ex. 30 (*In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service,* Case No. 14-841-EL-SSO, Choueiki Direct Testimony (October 2, 2014 )). [↑](#footnote-ref-8)
9. See Tr. Vol. XXX at 6218 -6222 (October 16, 2015); See also Proffered OCC Ex. 31 (*In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 13-2385, Choueiki Direct Testimony at 9 (May 20, 2014)); Proffered OCC Ex. 30 (*In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service,* Case No. 14-841-EL-SSO, Choueiki Direct Testimony at 17 (October 2, 2014 )). [↑](#footnote-ref-9)
10. See FirstEnergy Motion to Strike OCC/NOAC Reply Brief at 3-4. [↑](#footnote-ref-10)
11. See Tr. Vol. XXX at 6218 -6222 (October 16, 2015) (OCC proffered OCC Ex. 30 the testimony of Dr. Hisham Choueiki in Case No. 14-841-EL-SSO and OCC Ex. 31 the testimony of Dr. Hisham Choueiki in Case No. 13-2385-EL-SSO). [↑](#footnote-ref-11)
12. See OCC/NOAC Initial Brief at 171-173 (OCC/NOAC requesting that the PUCO reverse rulings where the Attorney Examiner erred in denying the admission of OCC Exhibits 30 and 31, the previous testimony of Dr. Choueiki, into the record). [↑](#footnote-ref-12)
13. See RESA’s Memorandum Contra the Motion to Strike by FirstEnergy, Case No. 14-1297-EL-SSO, at 2 (March 7, 2016). [↑](#footnote-ref-13)
14. See Tr. XXX at 6225:19-6226:4 (Choueiki public). [↑](#footnote-ref-14)
15. Tr. Tr. XXX at 6225:19-6226:4 (Choueiki public). [↑](#footnote-ref-15)
16. See FirstEnergy Motion to Strike OCC/NOAC Reply Brief at 1, 4-5 (the relevant portions are numbered 2). [↑](#footnote-ref-16)
17. FirstEnergy Motion to Strike OCC/NOAC Reply Brief at 4-5 citing Tr. Vol. XXXIX at 8388-8393. [↑](#footnote-ref-17)
18. See OCC/NOAC Initial Brief at 46-49. [↑](#footnote-ref-18)
19. See OCC/NOAC Reply Brief at 82 (“Furthermore, the PUCO should reverse the Attorney Examiner’s ruling that excluded Professor Hill’s testimony on the Consumer Protection Association.”). [↑](#footnote-ref-19)